IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GOETZ BUILDING COMPANY, L.L.C.,	)	No. 56752-7-I
	)	
Respondent/ Cross Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
GOETZ & SONS WESTERN MEAT, L.L.C.,	)	
	)	
	)	UNPUBLISHED
Appellant/ Cross Respondent,	)	
	)	FILED: August 21, 2006
	)	

COX, J. – Arbitration is a statutory procedure that permits very limited court review.[1] One of the limited grounds for modifying or correcting an arbitration award is where there is an evident miscalculation of figures.[2] Another is where an arbitrator so imperfectly executed his or her powers that a final and definite award upon the submitted subject matter was not made.[3] Here, neither of these criteria is met. And the landlord in this commercial lease dispute invited the error of which it now complains on appeal. We affirm in part, reverse in part, and remand.

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[1] Luvaas Farms v. Ferrell Farms, 106 Wn. App. 399, 404, 23 P.3d 1111 (2001).

[2] Former RCW 7.04.170(1).

[3] Former RCW 7.04.160(4).

Goetz & Sons Western Meat, L.L.C. ("Horton"),[4] leased from Goetz Building Co., L.L.C. ("Goetz") facilities in which it operated its meat processing business. The lease had a term of three years at a rental rate of $8,500 per month. The lease also contained an option to extend for an additional five years, the rental to be agreed upon by the parties. In the absence of agreement, the lease further provided that rental for the extended term was to be submitted to arbitration under the Washington Arbitration Act.

Because the parties could not agree to rental for the extended term, they submitted the matter to an arbitrator. Following an arbitration hearing, the arbitrator held that the fair market rental rate for the extended term should be set at $0.68 per square foot.

After the award, Horton and Goetz disagreed over the amount of the total square footage of the leased space, the commencement date of the fair market rental for the extended term, and whether the fair market rental value for the extended term should include an annual Consumer Price Index (CPI) adjustment. Goetz requested clarification of the arbitrator's ruling, and the arbitrator responded that clarification was not needed.

Goetz petitioned the superior court to correct the arbitration award in ways we will describe in more detail later in this opinion and to confirm the corrected award. Horton moved for summary judgment and dismissal of the petition. In response, Goetz also moved for summary judgment, seeking either

[4] Goetz & Sons is owned by Jim Horton. To avoid confusion we refer to this company as "Horton."

correction or modification of the arbitrator's award or remand to the arbitrator with instructions.

The court granted Horton's motion in part, concluding that the rental rate for the extended term commenced from the start of the extended lease, not from the date of the arbitration award. The court also granted Goetz's cross-motion for summary judgment in part, concluding that it was "clear error" for the arbitrator not to provide in his award for annual CPI rent increases for the extended term of the lease.

Both parties appeal.

MODIFICATION OF ARBITRATION AWARD

CPI Adjustment

Horton argues that the trial court erred in modifying the arbitration award to include an annual CPI rental adjustment. We agree.

Arbitration awards are given substantial finality by courts rendered in accordance with the parties' contract and RCW 7.04.[5] A court may confirm, vacate, modify, or correct an arbitration award but only for the reasons set forth in RCW 7.04.150-.170.[6] Judicial review of an arbitration award does not involve a review of the merits of the case.[7] Arbitration is limited to those issues the

[5] Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998).

[6] Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 279, 876 P.2d 896 (1994).

[7] Davidson, 135 Wn.2d at 119.

parties submit in writing to the arbitrator.[8]

Former RCW 7.04.170 provides:

> [T]he court shall . . . make an order modifying or correcting the award, upon the application of any party to the arbitration:
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> (1) Where there was an ***evident miscalculation*** of figures, or an ***evident mistake*** in the description of any person, thing or property, referred to in the award.
>
> (2) Where the arbitrators have awarded upon a matter not submitted to them.
>
> (3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy. The order must modify and correct the award, as to effect the intent thereof.[9]

Here, the issue submitted to arbitration was the "fair market value of the real estate leased by [Horton]." In response to the express written submissions of the parties, the arbitrator determined that the fair market value of rent was $0.68 per square foot. The arbitrator's decision in relevant part states:

> Accordingly, the Arbitrator, ***in considering fair market rental*** has considered the definition of "market rent" set forth in Terra Property Analytics appraisal. In doing so, the Arbitrator also considered the following factors: 1) The asset itself, its age and uniqueness, 2) Terra Property Anayltics [sic] appraisal of fair market rental with a blended rate of .45 sq. ft. (Terra); Macaulay & Associates fair market rate at .76 sq. ft., 3) the vacancy rates in commercial building in Snohomish County and more particularly in downtown Everett, and 4) the initial rent of $8,500.
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> Having considered this evidence and the testimony of the parties, the ***Arbitrator is satisfied that the fair market rental rate should***

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[8] Luvaas, 106 Wn. App. at 404 (citing Price v. Farmers Ins. Co., 133 Wn.2d 490, 496, 498, 946 P.2d 388 (1997)).

[9] (Emphasis added.)

be set at .68 [per] sq. ft.[10]

After the arbitrator's award, Goetz submitted a post-arbitration hearing motion requesting "clarification" of the award. Goetz requested the arbitrator to rule that the total square footage to which the $0.68 per square foot applies is 11,752 square feet; that the extended five year lease includes an annual CPI adjustment; and that the fair market value rent for the extended lease should commence on the date of the award. The arbitrator denied the request, finding no clarification was required. We agree with that statement.[11] The arbitrator had provided an unambiguous determination of the "fair market value" of the realty in accordance with the parties' written submissions. Goetz then commenced this proceeding.

The trial court summarily determined in its order that "the arbitrator's failure to provide in his award for annual CPI rent increases was clear error" based on former RCW 7.04.170. The court appears to have based its decision on its reading of Section 3.2 of the expired lease.

The first of two problems with this approach by the court is that there is no showing that the alleged error of the arbitrator warrants relief under any subsection of former RCW 7.04.170. Specifically, there is no showing that there was "an ***evident miscalculation*** of figures," as the statute requires before a court may modify or correct an award. The submissions requested

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[10] (Emphasis added.)

[11] Former RCW 7.04.175 limits modifications by the arbitrator to those matters set forth in former RCW 7.04.170 (1) and (3). Neither is applicable here for the reasons we explain in this opinion.

determination of fair market value and that is what the arbitrator decided. The parties do not argue that the mathematical calculation the arbitrator decided was a miscalculation, as the plain words of the statute require. Moreover, they do not argue that any other subsection of former RCW 7.04.170 applies. Clearly, the plain words of those other sections show that no other subsection applies.

The second problem is that the court's examination of the lease, which presumably was evidence at the hearing, violates a basic tenant of arbitration. It is a de novo review which the statutes prohibit.

For these reasons, the court's determination that CPI increases should apply to the extended lease term cannot be sustained.

Commencement of Extended Lease Term

Goetz argues that the trial court erred because it engaged in an improper de novo ruling on the merits of the arbitration issues not decided by the arbitrator. But Horton argues that Goetz is precluded from complaining that the trial court erred in interpreting the lease, finding the new rental rate commences from the start of the extended lease term, because Goetz invited the error. We agree with Horton.

A trial court reviewing an arbitration award is not permitted to conduct a trial de novo.[12] Thus, a trial court may not search the four corners of a contract to discern the parties' intent.[13] Under the doctrine of invited error "one may not

[12] Boyd v. Davis, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995).

[13] Id. at 263.

complain on review of errors below for which he is responsible."[14]

Here, Goetz requested the court in its cross-motion for summary judgment to correct and modify the arbitration award by determining the effective date of the new monthly rate. Alternatively, it asked the court to remand the matter to the arbitrator for a limited determination of the same issue.

In response, the trial court determined that Section 2.2 of the lease "provides for the new rent rate to commence from the start of the extended lease term, August 18, 2004, not from May 18, 2005 following the arbitration award." That decision was contrary to Goetz's argument below.

Having lost this issue below, Goetz now contends on appeal that it was error for the trial court to reach the merits of this case with respect to the effective date of the new rental rate. We agree. Goetz now contends that the trial court should have remanded this case to the arbitrator to modify its decision, the alternative argument Goetz made below.

We conclude that Goetz invited the error by requesting the trial court to modify the arbitrator's decision respecting the issue, and cannot now complain because the trial court rejected Goetz's theory.

Goetz cites Guntle v. Barnett[15] to argue that because the trial court did not adopt its proposal, i.e. the effective date begins May 18, 2005, invited error does not apply. That case is not helpful.

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[14] Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1270 (9th Cir. 2002).
[15] 73 Wn. App. 825, 871 P.2d 627 (1994).

In that case, Robert Guntle sued his partners, Barnett and Tommy Guntle, requesting the trial court to distribute the partnership assets and debts according to the Uniform Partnership Act, RCW 25.04.[16] During final arguments, Guntle proposed that the court distribute all of the assets and debt to him, and that the remaining debts be distributed to Barnett.[17] The trial court distributed the partnership assets and debts in kind, as opposed to selling the assets, liquidating the debts, and distributing any surplus in cash, as required by RCW 25.04.

On appeal, Guntle argued that the trial court erred in not distributing the partnership assets and debts according to RCW 25.04. Barnett argued that Guntle invited the error in his final arguments.[18] Division Two of this court held that "Although this contention might have merit if the trial court had adopted Guntle's proposal, it did not do that; rather, it devised and ordered its own. In so doing, it was 'governed by the applicable law.'"[19]

Guntle is unpersuasive. Maynard Inv. Co. v. McCann, the supreme court case Division Two cites, does not support the court's assertion that invited error does not apply. Rather, Maynard discusses that issues not preserved below

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[16] Id. at 828, 832.

[17] Id. at 832.

[18] Id.

[19] Id. (citing Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970) (discussing that issues can be raised for the first time on appeal if an exception applies, i.e. if the matter in question affects the public interest)).

may be raised for the first time on appeal if an exception applies.[20]

To summarize, the trial court did not interpret the effective date of the new rental term to start from the date that Goetz requested. But that does not preclude the application of the invited error doctrine to Goetz to bar relief on that issue on appeal.

ATTORNEY FEES

Horton and Goetz both request attorney fees on appeal. We award attorney fees to Horton and deny fees to Goetz.

Under RCW 4.84.330, the prevailing party is entitled to attorney fees for actions on a lease where the lease provides for attorney fees. A party may request reasonable attorney fees on appeal under RAP 18.1.

Here, the lease agreement provides for attorney fees and costs to the prevailing party in a suit arising under the lease. Horton is the prevailing party on appeal and is thus, entitled to fees on appeal.

Goetz relies on Dayton v. Farmers Ins. Group[21] to argue that because the arbitrator denied attorney fees to both parties, this court cannot award fees. In that case, the supreme court reversed the trial court's award of attorney fees for arbitration and the action to confirm arbitration because the award did not meet the criteria to correct or modify an arbitration award.[22] Also, there was no

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[20] Maynard, 77 Wn.2d at 622-23.
[21] 124 Wn.2d 277.

[22] Id. at 280.

contract, statute, recognized ground of equity, or exception to award fees.

Unlike Dayton, we are not awarding attorney fees for arbitration, which would require a basis to modify or correct the arbitration award. Rather, we are awarding fees on appeal because Horton is the prevailing party and fees are allowed under the parties' lease.

Pursuant to RAP 18.1(i), we remand to the trial court for it to determine the amount of fees.

We affirm the trial court's order determining the effective date of the new rental term, reverse the order modifying the arbitration award, and remand for further proceedings.

Cox, J.

WE CONCUR:

Schindler, ACJ

Grosse, J